Supreme Court, U.S.
FILED
08-364 SEP 22 2008
OFFICE OF THE CLERK

No. 08-

IN THE
Supreme Court of the United States

MCWANE, INC., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

LAWRENCE S. LUSTBERG
KEVIN MCNULTY
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
JASON J. MENDRO
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Cross-Petitioners
[Additional Counsel Listed on Inside Cover]

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars retrial when the government failed to produce sufficient evidence under the correct definition of the elements of the offense.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following parties are cross-petitioners in this cross-petition and respondents in *United States of America v. McWane, Inc., et al.*, No. 08-223: McWane, Inc.; James Delk; and Michael Devine. All cross-petitioners were defendants in the district court. Cross-petitioner McWane, Inc., was an appellant in the court of appeals. Cross-petitioners Delk and Devine were appellants and cross-appellees. Charles Barry Robison was a defendant in the district court. He is not, however, a respondent or cross-petitioner in this Court pursuant to Supreme Court Rule 12.6.

Pursuant to this Court's Rule 29.6, undersigned counsel state that McWane, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

The United States of America is the respondent in this cross-petition and petitioner in *United States of America v. McWane, Inc., et al.*, No. 08-223. The United States brought this prosecution in the district court and was the appellee and cross-appellant in the court of appeals.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION 3

I. THE COURT OF APPEALS' DECISION TO REMAND FOR A RETRIAL VIOLATES THE DOUBLE JEOPARDY CLAUSE 5

II. THE COURT OF APPEALS' DECISION ENLARGES A CIRCUIT CONFLICT OVER THE APPLICATION OF THE DOUBLE JEOPARDY CLAUSE 15

III. RESOLVING THE FIFTH AMENDMENT QUESTION THAT HAS DIVIDED THE CIRCUIT COURTS IS ESSENTIAL TO THE CONSISTENT AND FAIR ADMINISTRATION OF CRIMINAL JUSTICE 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcroft v. Free Speech Coal.,
535 U.S. 234 (2002) 18

Bailey v. United States,
516 U.S. 137 (1995) 16

Bousley v. United States,
523 U.S. 614 (1998) 8

Burks v. United States,
437 U.S. 1 (1978) 5, 7, 8, 9, 11

Green v. United States,
355 U.S. 184 (1957) 10

Greene v. Massey,
437 U.S. 19 (1978) 6

Justices of Boston Mun. Ct. v. Lydon,
466 U.S. 294 (1984) 7

Lockhart v. Nelson,
488 U.S. 33 (1988) 8, 9

Lujan v. Nat'l Wildlife Fed'n,
497 U. S. 871 (1990) 11

Rapanos v. United States,
547 U.S. 715 (2006) 4, 7, 11, 13, 15, 19

Ratzlaf v. United States,
510 U.S. 135 (1994) 17

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 8, 15

Sanabria v. United States,
437 U.S. 54 (1978) 9

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs,
531 U.S. 159 (2001) 3, 11, 13

Tibbs v. Florida,
457 U.S. 31 (1982) 6, 7

United States v. Douglas,
874 F.2d 1145 (7th Cir. 1989) 16

United States v. Durrive,
902 F.2d 1221 (7th Cir. 1990) 16

United States v. Ellyson,
326 F.3d 522 (4th Cir. 2003) 18

United States v. Haddock,
961 F.2d 933 (10th Cir. 1992) 15

United States v. Hightower,
96 F.3d 211 (7th Cir. 1996) 17

United States v. Holland,
116 F.3d 1353 (10th Cir. 1997) 16

United States v. Jackson,
103 F.3d 561 (7th Cir. 1996) 17

United States v. McPhail,
112 F.3d 197 (5th Cir. 1997) 17

United States v. Miller,
84 F.3d 1244 (10th Cir. 1996).....16

United States v. Miller,
952 F.2d 866 (5th Cir. 1992).....16

United States v. Oreira,
29 F.3d 185 (5th Cir. 1994).....17

United States v. Porter,
807 F.2d 21 (1st Cir. 1986).....16

United States v. Recio,
371 F.3d 1093 (9th Cir. 2004).....17

United States v. Robinson,
96 F.3d 246 (7th Cir. 1996).....17

United States v. Rodgers,
466 U.S. 475 (1984).....12

United States v. Sanchez-Corcino,
85 F.3d 549 (11th Cir. 1996).....6, 8, 10, 13

United States v. Smith,
82 F.3d 1564 (10th Cir. 1996).....16

United States v. Szado,
912 F.2d 390 (9th Cir. 1990).....15

United States v. Wacker,
72 F.3d 1453 (10th Cir. 1995).....16

United States v. Wallach,
979 F.2d 912 (2d Cir. 1992).....15

United States v. Weems,
49 F.3d 528 (9th Cir. 1995).....17

Webster v. Duckworth,
767 F.2d 1206 (7th Cir. 1985).....9, 11

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.....2, 5, 18, 19

STATUTES

18 U.S.C. § 924(c).....16

28 U.S.C. § 1254(1).....1

OTHER AUTHORITIES

Sarah O. Wang, *Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications*, 79 Va. L. Rev. 1381 (1993).....15, 19

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

McWane, Inc., James Delk and Michael Devine conditionally cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. If the Court grants the petition in *United States of America v. McWane, Inc., et al.*, No. 08-223, it should also grant this cross-petition.

OPINION BELOW

The opinion of the court of appeals (08-223 Pet. App. 1a–41a) is reported at 505 F.3d 1208.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. The court of appeals denied each side's petition for rehearing on March 27, 2008. 08-223 Pet. App. 42a–59a. On June 14, and again on July 18, Justice Thomas extended the time within which to file the petition for a writ of certiorari, eventually up to and including August 22, 2008. The government's petition for a writ of certiorari in *United States of America v. McWane, Inc., et al.*, No. 08-223 was filed on August 21, 2008. This conditional cross-petition is filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

This conditional cross-petition concerns the court of appeals' decision to remand for a new trial, rather than to enter judgments of acquittal, after reversing cross-petitioners' convictions under the Clean Water Act ("CWA"), and on related counts. The government's petition in No. 08-223 concerns the court of appeals' determination that the jury instructions improperly stated the definition of "navigable waters" under the CWA and that the instructional error was not harmless. Cross-petitioners argued in the court of appeals that they were entitled to judgments of acquittal because the government failed to adduce evidence sufficient to prove the "navigable waters" element of their alleged offenses according to the correct rule of law. Although the government had ample notice before and during trial that its proposed

definition of navigable waters was overly broad, the court of appeals declined to hold that the Double Jeopardy Clause bars retrial. 08-223 Pet. App. 2a, 32a. The court ruled that it need not inquire further into sufficiency of the proofs after determining that the government had presented enough evidence under its own *erroneous* interpretation of the element.

The ruling that the government is entitled to correct its own earlier error and attempt to present sufficient evidence of the navigable waters element for the first time at a new trial is worthy of this Court's review. This issue has deeply divided the circuits, and the approach adopted by the Eleventh Circuit conflicts with this Court's double jeopardy precedents. In the event this Court grants the government's petition in No. 08-223, this Court should also grant review of the court of appeals' refusal to enter judgments of acquittal.

The underlying facts and procedural history are set forth in cross-petitioners' brief in opposition to the government's petition in No. 08-223 and are incorporated by reference.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The government has stubbornly refused to acknowledge this Court's repeated rejection of its nearly boundless view of federal authority under the Clean Water Act. Before trial of this case, the government insisted that the Court's ruling in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001), was "irrelevant" to the law governing the discharges into Avondale Creek. On appeal,

and again before this Court, the government proceeds as if its defeat in *Rapanos v. United States*, 547 U.S. 715 (2006), was a triumph, and as if the derisive rejection of its overreaching in prior cases was instead an endorsement of such tactics. In the government's view, its deliberate and calculated decision to seek convictions based on the minimal evidence consistent with its own self-serving, boundless and already rejected legal theory must be rewarded with another opportunity to convict the cross-petitioners at yet another trial.

The government is entitled to a "do over"—according to it and the court of appeals—because it prompted the trial court to commit two errors instead of one. Had the government simply failed to introduce legally sufficient evidence on the navigable waters element of the CWA, there would be no question that cross-petitioners are entitled to judgments of acquittal. But, according to the Eleventh Circuit and the government, because the government *also* induced the trial court to commit instructional error—letting the jury convict based on the government's preferred, less demanding view of the law—a new trial rather than outright dismissal is permitted. That view cannot be squared with this Court's cases, and it offends those values at the very core of the Double Jeopardy Clause.

If the Court grants the petition in 08-223, it should also grant review to resolve a division of circuit court authority over whether the Double Jeopardy Clause bars retrial when the government has failed to introduce evidence sufficient to support a conviction under the definition of the offense as stated by this Court following trial. Confusion over this question has resulted in extensive litigation,

decades of inconsistent rulings, and unconstitutional retrials. The issue frequently recurs when the Court rules, following a circuit split, that the elements of a crime are narrower than some courts have previously held. This case presents an opportunity to resolve this intractable conflict over the correct application of the Double Jeopardy Clause, an issue that takes on even greater importance when the government elects for tactical reasons to present evidence at trial satisfying only an impermissibly narrow interpretation of the elements of the charged offense.

I. THE COURT OF APPEALS' DECISION TO REMAND FOR A RETRIAL VIOLATES THE DOUBLE JEOPARDY CLAUSE

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. It "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). A reviewing court may remand for a new trial where the errors below—so-called trial errors such as improper admission of evidence or improper joinder—are not accompanied by a failure of proof. This is because "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Id.* at 15. But just as retrial is barred where the jury acquits, "the Double Jeopardy Clause precludes a second trial once a reviewing court has determined that the evidence introduced at trial was

insufficient to sustain the verdict." *Greene v. Massey*, 437 U.S. 19, 24 (1978).

The Eleventh Circuit agreed with cross-petitioners that the convictions must be reversed because the jury was allowed to convict based on evidence that was legally insufficient. But the court of appeals, relying on its opinion in *United States v. Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996), went on to hold that the government may have a second bite at the apple, even if it failed to muster sufficient evidence—indeed, *any* evidence—of an essential element of the charged offenses: a significant nexus between Avondale Creek and a navigable-in-fact water. 08-223 Pet. App. 32a. And it permitted retrial even though the government bore full responsibility for its own failure to present sufficient proofs, having adamantly insisted that it need not present the evidence required by the Act and even having succeeded in gaining the trial court's endorsement of that erroneous view of the law. The court of appeals' ruling is flatly contrary to this Court's double jeopardy jurisprudence.

1. The first error in the Eleventh Circuit's ruling is its premise that an appellate court may ignore insufficiency of the evidence if it reverses on other grounds. *Id.* This Court has recognized that such an approach would undermine the core protection of the Double Jeopardy Clause, which is the right not to be forced to endure a second trial after the government has failed to muster sufficient proof on its first attempt. As this Court explained in *Tibbs v. Florida*, 457 U.S. 31 (1982), "appellate judges" must "faithfully honor their obligations" to assess any due process claims of insufficient evidence *before* reaching

weight-of-the-evidence arguments that would permit retrial. *Id.* at 44–45; *see also id.* at 51 (White, J., dissenting) ("Hence, the [sufficiency] issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict."). Simply put, a court "may not, consistent with the rule of *Burks v. United States*, ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial." *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 321–22 (1984) (Brennan, J., concurring) (citation omitted).

Indeed, were the law otherwise, the government would be able to circumvent the Double Jeopardy Clause by mining the trial proceedings with other errors that ease its burden at trial—as it did here. If the government's first attempt to convict based on lesser proofs is rejected on appeal, it may then try a second time under the more rigorous test that it previously avoided. Such an outcome strikes at the core of the protections contained in the Double Jeopardy Clause.

2. Despite a reviewing court's duty under the Double Jeopardy Clause to resolve evidentiary sufficiency claims in addition to—rather than instead of—other types of error, the court of appeals concluded that it "need not evaluate whether there was insufficient evidence that defendants' discharges were into 'navigable waters' as that term is properly defined under *Rapanos*," because that is not the way the term was defined by the district court at the time of trial based on that court's understanding of then-prevailing circuit precedent. 08-223 Pet. App. 31a–32a. But it does not matter whether such a test was

consistent with the law as then understood by the lower court. Rather, it is well established that decisions "holding that a substantive federal criminal statute does not reach certain conduct" apply to cases on direct appeal (and even retroactively to those on collateral attack). *Bousley v. United States*, 523 U.S. 614, 620–21 (1998).

This principle follows from the proposition that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994). Accordingly, an appellate court assessing the sufficiency of the evidence must apply the correct legal standard—that is, the one prevailing at the time of appeal—even if the jury rendered its verdict based on a broader (and hence, improper) definition of the elements of the offense.

3. In characterizing the government's evidentiary failure as the type of error that does not bar retrial, *Sanchez-Corcino* misconstrued *Lockhart v. Nelson*, 488 U.S. 33 (1988). *See Sanchez-Corcino*, 85 F.3d at 554 n.4. *Lockhart* does not remotely support the court of appeals' ruling in this case. That decision identified a narrow circumstance—not applicable here—under which the Double Jeopardy Clause would allow retrial; specifically, *Lockhart* held that retrial is permitted where the evidence admitted at the first trial was *actually sufficient* to establish guilt beyond a reasonable doubt, even though the proofs would have been insufficient if certain evidence had not been erroneously admitted. 488 U.S. at 40–41. "[I]ncorrect receipt or rejection of evidence" is, of course, quintessential "trial error[]" under *Burks*. *Id.*

at 40 (quoting *Burks*, 437 U.S. at 14–16). *Lockhart* therefore allows retrial where reversible error occurs *despite* the presence of sufficient evidence in the record for a jury to convict. Here, relying on *Sanchez-Corcino*, the court of appeals improperly applied this rule to a case where reversible error occurred *in addition to* an utter failure to present sufficient evidence on an essential element of each offense.

This Court has never recognized such a sprawling application of *Lockhart*. On the same day it decided *Burks*, this Court also held that the Double Jeopardy Clause bars retrial even when "trial court error in [the defendant's] favor on a midtrial motion leads to an acquittal." *Sanabria v. United States*, 437 U.S. 54, 78 (1978); *see also Webster v. Duckworth*, 767 F.2d 1206, 1214–16 (7th Cir. 1985) ("*Sanabria* precludes carving an exception out of the *Burks* rule on the basis of an alleged 'trial error' that results in insufficient prosecution evidence."). The government's assertion that it can retry defendants when the failure of proof is accompanied by trial court error in *the government's* favor—much less where the government *created* the trial error—defies logic. *Burks* holds that reversal for insufficient evidence is tantamount to acquittal, 437 U.S. at 16–18, and there is simply no basis for casting off the protections of the Double Jeopardy Clause when the error associated with evidentiary insufficiency was urged by—and substantially benefited—the government rather than the defendant.

4. The court of appeals nonetheless believed that there is an exception to the bar against double jeopardy where the district court's decision to permit conviction based on less than adequate proof of an essential element deprived the government "'of an

opportunity or incentive to present evidence that might have'" been legally sufficient. 08-223 Pet. App. 31a (quoting *Sanchez-Corcino*, 85 F.3d at 554 n.4). The Double Jeopardy Clause permits no such limitation on this important right.

> The underlying idea [of the Double Jeopardy Clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187–88 (1957). The government's resources and power are no less formidable; its attempt to convict is no less repeated; the defendant's embarrassment, expense, ordeal, and continuing states of anxiety and insecurity are no less intense; and the possibility of an erroneous conviction is no less enhanced, in those cases in which the government supposedly lacked the same opportunity or incentive the first time around.

It is particularly repugnant that the government may run cross-petitioners through the gauntlet a second time where the purported lack of opportunity and incentive to comply with the statute's proof requirements is purely a product of the government's own obstinate behavior. From the pretrial proceedings to this very day, the government has steadfastly refused to acknowledge the true limits of its powers under the CWA. Instead, as was true

with its litigating position in cases such as *SWANCC* and *Rapanos*, the federal agencies responsible for enforcing the Act have clung to the view that their power to regulate discharges into purely intrastate, remote and insubstantial bodies of water (and even non-waters) is practically boundless. The government has clung to that view despite this Court's flat rejection of it both before and after trial. Refusing to accept the import of this Court's ruling in *SWANCC*, the government successfully avoided a jury instruction that would have required the jury to find a significant nexus between Avondale Creek and a navigable-in-fact water dozens of miles away. *That* is the reason—the only reason—the government could offer for failing even to attempt to fulfill its duty to present sufficient evidence on the navigable waters elements.

The Double Jeopardy Clause does not give the government a second chance to present sufficient evidence of guilt where the previous failure was of its own making. "[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 897 (1990); *see also Webster*, 767 F.2d at 1215–16 ("If a prosecutor's miscalculation of how much evidence is enough would permit a second trial, *Burks* would be drained of substance."). And even if there had been a legitimate basis for the government to adhere to its view of the definition of navigable waters under the Act, nothing in the text or purpose of the Fifth Amendment suggests that it may attempt to cure its failure of proof through a retrial simply because this Court's post-trial decision on the meaning

of a statute differs from the interpretation previously adopted by some lower courts.[1]

5. Even assuming *arguendo* that, as the Eleventh Circuit concluded, the protection against double jeopardy must occasionally yield even though the government failed to muster sufficient evidence, such an exception has no place where the government was aware of the risks of offering less evidence and made a conscious, tactical decision to take that risk.

There is no question that the government, had it chosen to do so, could have presented evidence in an attempt to show a significant nexus even while pursuing the jury instruction it erroneously requested. Before and during trial cross-petitioners not only agreed that the government was *allowed* to offer evidence of a significant nexus between the point of discharge and a navigable-in-fact water; cross-petitioners argued strenuously that such proof was *required*. The trial court did not restrict the government's ability to present such evidence; the government simply elected not to do so. In fact, even though the test articulated by the court of appeals focuses on whether the government had the opportunity and incentive to present sufficient evidence, the

---

[1] Ironically, the government's position would give the state greater protections than those afforded individuals under the Due Process Clause. *See United States v. Rodgers*, 466 U.S. 475, 483 (1984) (holding that persons may be punished, even if their conduct was outside the scope of the criminal statute as it was then interpreted by the pertinent federal court of appeals, if a subsequent change in the interpretation of the statute was "reasonably foreseeable").

court did not so much as suggest that the government was deprived of that opportunity at any point before or during respondents' lengthy trial.

The government was on full and fair notice of the "significant nexus" test from *SWANCC* over four years before trial. 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA" previously.). Indeed, as the Chief Justice observed in *Rapanos*, *SWANCC* had rejected the government's "view that its authority" under the CWA "was essentially limitless"; and the government's loss in *Rapanos* was directly traceable to its refusal to acknowledge "*some* notion of an outer bound to the reach of [its] authority." 547 U.S. at 757–58 (Roberts, C.J., concurring) (emphasis in original). Beginning well before trial, cross-petitioners emphasized the government's obligation to present evidence meeting the test that was later set forth in *Rapanos* in their frequent and timely objections to the use of the government's overly broad definition of navigable waters.[2]

The erroneous jury instruction that provides the purported basis for retrying cross-petitioners is the very instruction that the government itself urged on the district court, and that the cross-petitioners fer-

---

[2] In contrast, the defendant in *Sanchez-Corcino* waited until *after* the close of the government's case to argue that a conviction for "willfully" selling firearms without a license requires a type of proof that the government had failed to muster. 85 F.3d at 552.

vently opposed. The evidence the government failed to offer at trial—if indeed it exists or can now be created—is evidence that the government had every opportunity and incentive to develop and present. Even if there had been a colorable basis for the government to cling to its overly expansive view of the Act, nothing prevented or even discouraged the government from offering additional evidence on the navigable water element in the event its view did not prevail on appeal. But the government failed even to investigate the possibility of a significant nexus between Avondale Creek and the Black Warrior River, and now it would need to manufacture new evidence before a retrial—evidence that purports to recreate the depth, flow and other features of dozens of miles of waterways as they existed more than seven years ago. It is difficult to imagine a stronger case for enforcing the right not to be placed twice in jeopardy for the same offense.

The upshot of the court of appeals' holding is that the government is encouraged *not* to produce sufficient evidence on an element of the offense if it succeeds in arguing to the trial court that a more government-friendly test of liability is appropriate. In such a case, the government may first attempt to convict where its burden is light, and if that fails on appeal it may have another bite at the apple under the appropriate legal standard. The government, however, may not impose on individuals the embarrassment, expense, ordeal and risk of erroneous conviction that comes with multiple trials, as the price for its pursuit of a "substantially more efficient and straightforward" way to obtain guilty verdicts. *See* 08-223 Pet. 28.

The court of appeals should have assessed the sufficiency of the evidence based on the correct rule of law set forth in *Rapanos*, not the incorrect rule advocated by the government at trial. Because that intervening legal decision was "an authoritative statement of what" the CWA "meant before as well as after the decision" in *Rapanos*, *see Roadway Express*, 511 U.S. at 312–13, the trial to be held on remand is a trial on the "same offence" and therefore impermissible.

II. THE COURT OF APPEALS' DECISION ENLARGES A CIRCUIT CONFLICT OVER THE APPLICATION OF THE DOUBLE JEOPARDY CLAUSE

The circuit courts have been divided for decades over how to apply the Double Jeopardy Clause when a post-trial decision reveals that the government's trial evidence was insufficient. Indeed, it has now been several years since "a split has emerged among the circuits" over the preliminary question of whether appellate courts must evaluate sufficiency-of-the-evidence claims when there are other grounds for reversal. *See* Sarah O. Wang, *Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications*, 79 Va. L. Rev. 1381, 1388 (1993).[3] The

---

[3] The Second, Ninth, and Tenth Circuits have held that insufficiency of evidence claims should be reviewed, even if there are other grounds for reversal. *See, e.g.*, *United States v. Wallach*, 979 F.2d 912 (2d Cir. 1992); *United States v. Haddock*, 961 F.2d 933, 934 (10th Cir. 1992) (en banc); *United States v. Szado*, 912 F.2d 390, 393 (9th Cir. 1990). The First, Fifth, and Seventh Circuits have held that evidentiary sufficiency need not be addressed when a conviction can be reversed for other reasons.

[Footnote continued on next page]

court of appeals' decision here deepens that sharp divide.

The Fifth, Seventh, and Tenth Circuits have all held, in the context of convictions under 18 U.S.C. § 924(c), that the Double Jeopardy Clause bars retrial if the government failed to present evidence that is sufficient under a test that was first announced by this Court post-trial. *See Bailey v. United States*, 516 U.S. 137 (1995). The Tenth Circuit held that "if the evidence was insufficient so that a directed verdict of acquittal should have been entered, remand would violate the Double Jeopardy Clause." *United States v. Smith*, 82 F.3d 1564, 1567 (10th Cir. 1996).[4] The Seventh Circuit has adopted a similar approach, remanding for retrial only when the original evidence was sufficient to support a con-

---

[Footnote continued from previous page]
See United States v. Miller, 952 F.2d 866, 874 (5th Cir. 1992); *United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir. 1989), *abrogated on other grounds*, *United States v. Durrive*, 902 F.2d 1221 (7th Cir. 1990); *United States v. Porter*, 807 F.2d 21, 24 (1st Cir. 1986).

[4] A series of Tenth Circuit decisions are in accord despite seemingly contrary language in one of its earliest post-*Bailey* decisions. *Compare United States v. Wacker*, 72 F.3d 1453, 1465 (10th Cir. 1995) ("[T]he government here cannot be held responsible for 'failing to muster' evidence sufficient to satisfy a standard which did not exist at the time of trial."), *with United States v. Miller*, 84 F.3d 1244, 1258 (10th Cir. 1996) ("[W]e will remand for a new trial only if the jury could have returned a guilty verdict if properly instructed."), *overruled on other grounds*, *United States v. Holland*, 116 F.3d 1353 (10th Cir. 1997).

viction for using or carrying a firearm according to the newly articulated test. *See, e.g.*, *United States v. Hightower*, 96 F.3d 211, 215 (7th Cir. 1996) ("The only step to be taken on this record is to vacate the conviction on Count III and to remand for dismissal of those charges."); *United States v. Robinson*, 96 F.3d 246, 250 (7th Cir. 1996); *United States v. Jackson*, 103 F.3d 561, 569 (7th Cir. 1996). The Fifth Circuit followed suit. *See United States v. McPhail*, 112 F.3d 197, 200 (5th Cir. 1997) ("[T]he Government is barred by double jeopardy from presenting more evidence on the carry theory.").

Years earlier, the Fifth Circuit had already suggested that the same double jeopardy analysis applied to appeals taken after this Court's decision in *Ratzlaf v. United States*, 510 U.S. 135 (1994), which clarified the standard for proving the illegal structuring of financial transactions. *See United States v. Oreira*, 29 F.3d 185, 188 n.5 (5th Cir. 1994). The Fifth Circuit permitted remand only after determining that there "was sufficient evidence to support a finding of guilt had the jury been properly charged" in accordance with *Ratzlaf*. *Id.* For that reason, the court explained, "remand for a new trial does not pose a double jeopardy problem." *Id.*

The Fourth and Ninth Circuits, however, have taken the opposite approach. For example, the Ninth Circuit permitted retrial even though the government's evidence was insufficient when analyzed after *Ratzlaf*. *See United States v. Weems*, 49 F.3d 528, 531 (9th Cir. 1995); *cf. United States v. Recio*, 371 F.3d 1093 (9th Cir. 2004) (allowing retrial after a post-trial decision regarding the termination of conspiracies).

The Fourth Circuit has also suggested that it would take the same approach with regard to convictions for the possession of child pornography after *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). *See United States v. Ellyson*, 326 F.3d 522, 532–34 (4th Cir. 2003). Although the court held that the government's evidence was sufficient to support the conviction both before and after *Free Speech Coalition*, it stated that it would have allowed retrial regardless of whether the new test was met. *Id.* at 533–34.

The persistence of these inconsistent outcomes demonstrates that the circuit courts are in need of guidance on how to apply the Double Jeopardy Clause following a decision of this Court that defines the elements of a criminal offense more narrowly than the rule of law that the prosecution successfully urged at trial.

III. Resolving The Fifth Amendment Question That Has Divided The Circuit Courts Is Essential To The Consistent And Fair Administration Of Criminal Justice

Correction of the court of appeals' decision is critical to ensuring the even-handed administration of criminal justice. Because the Double Jeopardy Clause confers procedural protections that transcend the substantive statutes at issue in particular cases, the question presented has arisen—and will continue to arise—when this Court or any appellate court interprets the elements of a criminal offense. As illustrated above, the question has arisen in the aftermath of this Court's interpretation of numerous statutes already. *See supra* Part II.

So long as such confusion is allowed to persist, similarly-situated defendants appearing before different courts will continue to face dramatically different outcomes. Extensive litigation will continue. The results will be unpredictable. And countless defendants will face the prospect of unconstitutional retrials. As one commentator lamented, "the Double Jeopardy Clause is one of the least understood and most heavily litigated clauses in the Bill of Rights." Wang, *supra* Part II, at 1384. This case provides an opportunity to clarify the scope of this vital Fifth Amendment protection where the government makes a deliberate choice to risk reversal while relentlessly pursuing an invalid theory of criminal liability.

CONCLUSION

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be granted if the Court grants the government's petition. Because it is so clear that the government presented insufficient evidence under any interpretation of the ruling in *Rapanos*, the Court may wish to affirm summarily the Eleventh Circuit's reversal of the convictions and remand with instructions for the court of appeals to dismiss the indictment on double jeopardy grounds.

Respectfully submitted.

LAWRENCE S. LUSTBERG
KEVIN MCNULTY
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
JASON J. MENDRO
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

G. DOUGLAS JONES
WHATLEY DRAKE & KALLAS LLC
P.O. Box 10647
Birmingham, AL 35202
(205) 328-9576

HENRY J. DEPIPPO
NIXON PEABODY LLP
1100 Clinton Square
P.O. Box 31051
Rochester, NY 14604
(585) 263-1243

FOURNIER J. GALE, III
J. ALAN TRUITT
CHRISTOPHER J. WILLIAMS
MAYNARD COOPER & GALE PC
2400 Regions Harbert Plaza
1901 6th Avenue North
Birmingham, AL 35203
(205) 254-1000

JACK W. SELDEN
DAVID E. ROTH
SCOTT BURNETT SMITH
BRADLEY ARANT ROSE & WHITE LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8000

JUDSON W. STARR
JOSEPH G. BLOCK
BRIAN L. FLACK
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
(202) 344-4000

Counsel for Respondents

SEPTEMBER 22, 2008

Supreme Court, U.S.
FILED
OCT 10 2008
OFFICE OF THE CLERK

No. 08-364

In the Supreme Court of the United States

MCWANE, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
KATHERINE W. HAZARD
DEBORAH WATSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars retrial of cross-petitioners when the court of appeals reversed their convictions because it determined that the jury instructions, although in accord with circuit precedent at the time, were incorrect under the intervening decision in *Rapanos* v. *United States*, 547 U.S. 715 (2006), and the court made no finding whether the evidence was sufficient under the standard that it interpreted *Rapanos* to establish.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 25

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *Free Speech Coaltion*, 535 U.S. 234 (2002) ... 20
Bailey v. *United States*, 516 U.S. 137 (1995) 19
Ball v. *United States*, 163 U.S. 662 (1896) 7
Burks v. *United States*, 437 U.S. 1 (1978) 7, 13
Fong Foo v. *United States*, 369 U.S. 141 (1962) 15
Jackson v. *Virginia*, 443 U.S. 307 (1979) 9
Justices of Boston Mun. Ct. v. *Lydon*, 466 U.S. 294 (1984) 8, 9, 10, 11
Lockhart v. *Nelson*, 488 U.S. 33 (1988) 7, 12, 13
McNally v. *United States*, 483 U.S. 350 (1987) 16
Neder v. *United States*, 527 U.S. 1 (1999) 9
Parker v. *Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004) 16
Patterson v. *Haskins*, 470 F.3d 645 (6th Cir.), cert. denied, 128 S. Ct. 90 (2007) 10, 11
Price v. *Georgia*, 398 U.S. 323 (1970) 8
Rapanos v. *United States*, 547 U.S. 715 (2006) 4, 23, 24
Richardson v. *United States*, 468 U.S. 317 (1984) ... 7, 9, 10
Sanabria v. *United States*, 437 U.S. 54 (1978) 15

Cases—Continued: Page

SWANCC v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) 15
Tibbs v. *Florida*, 457 U.S. 31 (1982) 11
United States v. *Anderson*, 896 F.2d 1076 (7th Cir. 1990) 17
United States v. *Bishop*, 959 F.2d 820 (9th Cir. 1992) 11, 21
United States v. *Bobo*, 419 F.3d 1264 (11th Cir. 2005) ... 22
United States v. *Douglas*, 874 F.2d 1145 (7th Cir.), cert. denied, 493 U.S. 841 (1989) 11, 17, 21
United States v. *Eidson*, 108 F.3d 1336 (11th Cir.), cert. denied, 522 U.S. 899, and 522 U.S. 1004 (1997) 4, 15
United States v. *Ellyson*, 326 F.3d 522 (4th Cir. 2003) ... 15
United States v. *Ganos*, 961 F.2d 1284 (7th Cir. 1992) ... 10
United States v. *Haddock*, 961 F.2d 933 (10th Cir.), cert. denied, 506 U.S. 828 (1992) 22
United States v. *Harmon*, 632 F.2d 812 (2d Cir. 1980) .. 14
United States v. *Hightower*, 96 F.3d 211 (7th Cir. 1996) 18
United States v. *Jackson*, 103 F.3d 561 (7th Cir. 1996) 18
United States v. *Lane*, 474 U.S. 438 (1986) 8
United States v. *McAleer*, 138 F.3d 852 (10th Cir.), cert. denied, 525 U.S. 854 (1998) 10
United States v. *McPhail*, 112 F.3d 197 (5th Cir. 1997) .. 17
United States v. *Miller*, 952 F.2d 866 (5th Cir.), cert. denied, 505 U.S. 1220 (1992) 11, 16, 21

Cases—Continued: Page

United States v. *Miller*, 84 F.3d 1244 (10th Cir.), cert. denied, 519 U.S. 985 (1996) 19, 20
United States v. *Oreira*, 29 F.3d 185 (5th Cir. 1994) 17
United States v. *Pearl*, 324 F.3d 1210 (10th Cir.), cert. denied, 539 U.S. 934 (2003) 20, 21
United States v. *Porter*, 807 F.2d 21 (1st Cir. 1986), cert. denied, 481 U.S. 1048 (1987) 10
United States v. *Robinson*, 96 F.3d 246 (7th Cir. 1996) 17, 18
United States v. *Romero*, 491 F.3d 1173 (10th Cir.), cert. denied, 128 S. Ct. 319 (2007) 20
United States v. *Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996), overruled on other grounds by *Bryan* v. *United States*, 524 U.S. 184 (1998) 5, 12, 15
United States v. *Simpson*, 94 F.3d 1373 (10th Cir.), cert. denied, 519 U.S. 975 (1996) 20
United States v. *Smith*, 82 F.3d 1564 (10th Cir. 1996) 19, 20
United States v. *Wacker*, 72 F.3d 1453 (10th Cir. 1996) 15, 19, 20
United States v. *Wallach*, 979 F.2d 912 (2d Cir. 1992), cert. denied, 508 U.S. 939 (1993) 21
United States v. *Weems*, 49 F.3d 528 (9th Cir. 1995) 15
United States v. *Wiles*, 106 F.3d 1516 (10th Cir.), cert. denied, 522 U.S. 947 (1997) 22
Vanderbilt v. *Collins*, 994 F.2d 189 (5th Cir. 1993) 10
Wisniewski v. *United States*, 353 U.S. 901 (1957) 21

Constitutions and statutes: Page

U.S. Const. Amend. V (Double Jeopardy Clause) .. *passim*
Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) 2
33 U.S.C. 1251(a) 23
33 U.S.C. 1311(a) 2
33 U.S.C. 1319(C)(2)(A) 2
33 U.S.C. 1362(7) 2, 23
33 U.S.C. 1362(12)(A) 2
Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 2
18 U.S.C. 924(c) 19

In the Supreme Court of the United States

No. 08-364

MCWANE, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 505 F.3d 1208.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. A petition for rehearing was denied on March 27, 2008 (Pet. App. 42a-59a). On June 14, 2008, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 25, 2008. On July 18, 2008, Justice Thomas further extended the time to and including August 22, 2008. The government's petition for a writ of certiorari in No. 08-223 was filed on August 21, 2008. The conditional

[1] All references to "Pet. App." are to the appendix in No. 08-223.

cross-petition for a writ of certiorari was filed on September 22, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, cross-petitioners were convicted under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA), of conspiring to knowingly discharge pollutants into the waters of the United States and of a variety of substantive violations of the Act. Cross-petitioner McWane, Inc., was sentenced to 60 months of probation and a $5 million fine; cross-petitioner Delk to 36 months of probation and a $90,000 fine; and cross-petitioner Devine to 24 months of probation and a $35,000 fine. The court of appeals reversed the convictions and remanded for a new trial. Pet. App. 1a-41a.

1. The underlying facts are fully set forth in the government's petition for a writ of certiorari (08-223 Pet. 2-14) and will only be briefly restated here. The Clean Water Act makes it a felony knowingly to discharge any pollutant into "navigable waters" without complying with the requirements of the Act. 33 U.S.C. 1311(a), 1319(C)(2)(A), 1362(12)(A). The CWA defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). Cross-petitioner McWane is a manufacturer of cast iron pipes, and cross-petitioners Delk and Devine are two high-level managers at McWane's Birmingham plant. Pet. App. 2a-3a.

Over a period of years, McWane, in violation of its CWA permit, regularly discharged large quantities of untreated contaminant-laden wastewater from the plant into Avondale Creek, a perennial stream that feeds into traditional navigable waters. Pet. App. 3a-6a. McWane's CWA permit for the plant authorized the discharge of specified amounts of treated industrial wastewater from one discharge point (DSN001) and the discharge of stormwater runoff from other discharge points (DSN002-DSN020). *Id.* at 5a. Instead of fixing the broken wastewater treatment system at the plant, Delk and Devine ordered employees to pump untreated, contaminated wastewater directly into Avondale Creek through the points authorized for discharge of stormwater runoff. *Id.* at 6a-7a.

The untreated wastewater accumulated in the plant's basements, the contents of which employees described as "nasty" and including sand cores, scrap metal, oil, "blacking," and soap, and the basements had to be pumped out weekly so that pipe manufacturing could continue. Pet. App. 6a; Tr. 969-972, 1160, 1785, 1882-1183, 3696. The pollutant levels in the discharges greatly exceeded the levels authorized by the CWA permit for discharges through DSN001 for oil and grease, which coats waterways and can reduce oxygen levels in water. Tr. 204, 226-227, 241, 248, 349, 490, 873; GX 56-003. The discharges also contained high levels of zinc, a metal that is toxic to aquatic life. Tr. 254, 273, 490-491; GX 33-003; GX 55-003. The discharges created a deposit on the bottom of the stream that resembled "white baby powder" and contained high levels of zinc, cadmium, and other metals. Tr. 568-569, 1401-1402; GX 107-003; GX 108B-002.

Delk and Devine knew that the discharges violated the plant's CWA permit, and they instructed the employees to conceal the violations by (*inter alia*) pumping at night and during rainstorms and to mislead regulators about the nature of the discharges. Pet. App. 6a-7a; Tr. 526, 1214-1215, 2747-2748, 2668-2669, 2890-2891.

Cross-petitioners were charged with multiple substantive CWA violations and one count of conspiracy to violate the CWA. Pet. App. 7a-8a. At trial, the district court, in accordance with the Eleventh Circuit's then-controlling decision in *United States* v. *Eidson*, 108 F.3d 1336, cert. denied, 522 U.S. 899, and 522 U.S. 1004 (1997), instructed the jury that a "water of the United States" includes any stream—whether it flows continuously or only intermittently—that may eventually flow into traditional navigable waters. Pet. App. 11a-12a. The district court had made clear far in advance of trial that it would employ that definition throughout the case. *Id.* at 32a.

After a six-week trial, the jury found cross-petitioners guilty of, *inter alia*, multiple substantive CWA violations and one count of conspiracy to violate the CWA. Pet. App. 8a-9a.

2. The court of appeals reversed the convictions in light of this Court's intervening decision in *Rapanos* v. *United States*, 547 U.S. 715 (2006), and remanded for a new trial. Pet. App. 1a-41a. The court of appeals held that Justice Kennedy's concurring opinion in *Rapanos* provides the legally controlling definition of "navigable waters" or "waters of the United States" as those terms are used in the CWA. *Id.* at 13a-25a. The court further held that the jury instructions did not embody Justice Kennedy's standard, which the court understood to require proof that a "water or wetland" has a "significant

nexus" to traditional navigable waters. *Id.* at 17a, 25a-26a. And the court held that the instructional error was not harmless. *Id.* at 26a-28a.

The court of appeals rejected cross-petitioners' claim that the instructional error entitled them to judgments of acquittal, rather than a new trial. Cross-petitioners argued that the evidence was insufficient to show that they had discharged the polluted wastewater into "a *Rapanos*-defined 'navigable water.'" Pet. App. 31a-32a. The court observed, however, that the evidence was sufficient to show that the discharges were into a "navigable water" as erroneously defined by the district court and that cross-petitioners made no claim of evidentiary insufficiency under that standard. *Id.* at 31a. The court then held that it "need not evaluate whether there was insufficient evidence that [cross-petitioners'] discharges were into 'navigable waters' as that term is properly defined under *Rapanos*." *Id.* at 31a-32a.

The court explained that, under *United States* v. *Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996), overruled on other grounds by *Bryan* v. *United States*, 524 U.S. 184 (1998), cross-petitioners would not be entitled to judgments of acquittal, regardless of whether the evidence was sufficient under the new *Rapanos* standard. Pet. App. 31a. *Sanchez-Corcino*, the court noted, held that "[r]emand for a new trial is the appropriate remedy where . . . [any] insufficiency of evidence is accompanied by trial court error whose effect may have been to deprive the Government of an opportunity or incentive to present evidence that might have supplied the deficiency." *Ibid.* (quoting *Sanchez-Corcino*, 85 F.3d at 554 n.4). That was the situation here, the court explained, because the district court had made clear well in advance of trial the definition of "navigable water" that it

would employ, and the district court's decision "deprived the government of any incentive to present evidence that might have cured any resulting insufficiency or met Justice Kennedy's 'significant nexus' test." *Id.* at 32a.

3. After the court of appeals denied petitions for rehearing filed by both the government and cross-petitioners, Pet. App. 42a-43a, the government filed a petition for a writ of certiorari. The government's petition argues that the court of appeals erroneously identified the controlling rule of law established by *Rapanos*, misinterpreted this Court's precedents governing how to interpret fractured decisions, and created a circuit conflict that warrants immediate review. 08-223 Pet. 14-32. Cross-petitioners then filed the instant conditional cross-petition for a writ of certiorari.

ARGUMENT

Cross-petitioners contend (Pet. 5-15) that the Double Jeopardy Clause bars their retrial on the Clean Water Act charges because, in their view, the evidence at their first trial was insufficient to support their convictions under the definition of "waters of the United States" that the court of appeals held was established by *Rapanos* v. *United States*, 547 U.S. 715 (2006). They further contend (Pet. 15-18) that the court of appeals' determination that retrial would not violate the Double Jeopardy Clause conflicts with decisions of the Fifth, Seventh, and Tenth Circuits. Cross-petitioners appear to base their double jeopardy theory on the assumption that the court of appeals correctly identified the governing rule of law under *Rapanos*. See Pet. 15. If this Court were to grant the government's petition for a writ of certiorari and reverse, however, their double jeopardy issue would not even arise.

In any event, cross-petitioners' conditional request for review lacks merit. The court of appeals correctly concluded that the Double Jeopardy Clause does not bar retrial of cross-petitioners, and the circuits on which cross-petitioners rely would reach the same conclusion. Moreover, this case is not an appropriate vehicle for resolving any tension that may exist among the courts of appeals, because the evidence was sufficient to support cross-petitioners' convictions under any possible interpretation of *Rapanos*.

1. It has long been settled that the Double Jeopardy Clause does not prohibit the government from retrying a defendant whose conviction has been reversed on appeal because of an error in the trial proceedings, including an erroneous jury instruction. *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988); *Burks* v. *United States*, 437 U.S. 1, 14-15 (1978); see *Ball* v. *United States*, 163 U.S. 662, 672 (1896). This Court has identified only one exception to that rule: in *Burks*, the Court held that the Double Jeopardy Clause bars retrial "when a defendant's conviction is reversed by an appellate court on the sole ground that the evidence was insufficient to sustain the jury's verdict." *Lockhart*, 488 U.S. at 39 (citing *Burks*, 437 U.S. at 18).

The different treatment of reversal for insufficient evidence and reversal for trial error reflects the principle that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson* v. *United States*, 468 U.S. 317, 325 (1984). "[A]n appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal." *Ibid.* It thus "terminate[s] the initial jeopar-

dy," and the Double Jeopardy Clause prohibits a successive prosecution. *Justices of Boston Mun. Ct.* v. *Lydon*, 466 U.S. 294, 308 (1984). In contrast, when a defendant's conviction has been set aside based on ordinary trial error, he remains in "continuing jeopardy" because the proceedings "have not run their full course." *Price* v. *Georgia*, 398 U.S. 323, 326 (1970). In those circumstances, a fundamental prerequisite for application of the Double Jeopardy Clause is not satisfied, and the Clause does not bar retrial. *Ibid.*; see *Lydon*, 466 U.S. at 308.

In this case, the court of appeals reversed cross-petitioners' convictions based *solely* on a finding of trial error—the conclusion that the jury instructions did not accurately reflect the definition of "waters of the United States" established by this Court's intervening decision in *Rapanos*. Pet. App. 25a-32a. Contrary to cross-petitioners' contention (Pet. 6), the court did *not* conclude that the evidence at trial was legally insufficient. Instead, the court stated that, because it was reversing for instructional error, it "need not evaluate whether there was insufficient evidence that [cross-petitioners'] discharges were into 'navigable waters' as that term is properly defined under *Rapanos*." Pet. App. 31a-32a.

The court of appeals did conclude that the government failed to establish that the instructional error was harmless. Pet. App. 27a-28a. But, as this Court has made clear, "the harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry." *United States* v. *Lane*, 474 U.S. 438, 476-477 & n.20 (1986). The harmless-error inquiry does not seek to determine whether there was sufficient evidence of guilt absent the error, but rather whether the error itself had a substantial influence on the verdict. *Id.* at 476 n.20. Conse-

quently, evidence can be sufficient to support a finding of guilt by a rational jury, see *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), even when the evidence is not so overwhelming that it renders an instructional error harmless beyond a reasonable doubt, *Neder* v. *United States*, 527 U.S. 1, 15-20 (1999). Because the court of appeals reversed cross-petitioners' convictions based on trial error, and the court made no finding that the evidence was legally insufficient to support their convictions, the Double Jeopardy Clause poses no bar to their retrial.

a. This Court's prior decisions preclude cross-petitioners' apparent contention that, under *Burks*, an insufficiency of proof at their first trial would, in and of itself, bar retrial. In *Richardson*, after a judge declared a mistrial when the jury hung, the defendant argued that the Double Jeopardy Clause prohibited his retrial because the government had presented insufficient evidence to convict at the first trial. This Court rejected that claim because "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy." *Richardson*, 468 U.S. at 326. Because there had been no jeopardy-terminating event, such as an acquittal or a judicial finding of insufficient evidence, the Court concluded that Richardson had "no valid double jeopardy claim" "[r]egardless of the sufficiency of the evidence at [his] first trial." *Ibid.*

The Court reached a similar conclusion in *Lydon*, which involved a defendant who, under Massachusetts' two-tier system of trial courts, elected a *de novo* retrial before a jury after he had been convicted at a bench trial. Lydon argued that the Double Jeopardy Clause precluded the retrial because "the evidence at the bench trial was insufficient to convict." 466 U.S. at 307. The

Court rejected that argument, reasoning that, unlike the defendant in *Burks*, "who could rest his claim upon the appellate court's determination of insufficiency," Lydon had "fail[ed] to identify any stage of the state proceedings that can be held to have terminated jeopardy." *Id.* at 309. The Court observed that Lydon "has not been acquitted; he simply maintains that he ought to have been." *Id.* at 307. But a "claim of evidentiary failure and a legal judgment to that effect," the Court held, "have different consequences under the Double Jeopardy Clause." *Id.* at 309.

Richardson and *Lydon* thus make clear that "the *Burks* bar only prevents retrial when the appellate court *in fact* reverses for insufficient evidence." *Vanderbilt* v. *Collins*, 994 F.2d 189, 195 (5th Cir. 1993); accord *Patterson* v. *Haskins*, 470 F.3d 645, 657 (6th Cir.), cert. denied, 128 S. Ct. 90 (2007); *United States* v. *McAleer*, 138 F.3d 852, 856-857 (10th Cir.), cert. denied, 525 U.S. 854 (1998); *United States* v. *Ganos*, 961 F.2d 1284, 1285 (7th Cir. 1992) (per curiam); *United States* v. *Porter*, 807 F.2d 21, 23-24 (1st Cir. 1986), cert. denied, 481 U.S. 1048 (1987). Because that has not occurred here, the Double Jeopardy Clause does not bar cross-petitioners' retrial.

b. *Richardson* and *Lydon* also refute cross-petitioners' contention (Pet. 6-7) that the Double Jeopardy Clause required the court of appeals to review the sufficiency of the evidence at their first trial under the *Rapanos* standard. In rejecting the double jeopardy claim in *Richardson*, the Court stated that "*Burks* simply does not require that an appellate court rule on the sufficiency of the evidence because retrial might be barred by the Double Jeopardy Clause." *Richardson*, 468 U.S. at 323. The only distinction between *Richardson* and this case is that the jury found cross-petitioners guilty, ra-

ther than hanging. But a defendant has no better double jeopardy claim when the jury has found him guilty, as opposed to failing to reach a verdict, as *Lydon* confirms. In *Lydon*, the Court rejected the defendant's argument "that he [was] entitled under the Federal Constitution to a review of the evidence presented at the bench trial [at which he was found guilty] before proceeding with the second-tier trial." 466 U.S. at 309-310. And "a defendant who elects to be tried *de novo* is in the same position as a convicted defendant who successfully appeals," *i.e.*, neither of them is entitled to a ruling on whether the evidence at the first trial was sufficient. *Id.* at 306. The Double Jeopardy Clause "does not reach so far." *Id.* at 310.

Richardson and *Lydon* thus establish that the Double Jeopardy Clause does not require a court of appeals that has reversed a conviction for instructional error also to decide whether the trial evidence was sufficient under the correct instructions. See *Patterson*, 470 F.3d at 658; *United States* v. *Bishop*, 959 F.2d 820, 829 n.11 (9th Cir. 1992); *United States* v. *Miller*, 952 F.2d 866, 874 (5th Cir.), cert. denied, 505 U.S. 1220 (1992); *United States* v. *Douglas*, 874 F.2d 1145, 1149-1150 (7th Cir.), cert. denied, 493 U.S. 841 (1989). Accordingly, the court below did not err in refusing to evaluate the sufficiency of the evidence at cross-petitioners' first trial under the *Rapanos* standard.[2]

---

[2] Contrary to cross-petitioners' contention (Pet. 6-7), *Tibbs* v. *Florida*, 457 U.S. 31 (1982), does not support a different conclusion. In *Tibbs*, the Court held that the Double Jeopardy Clause does not bar a retrial when a conviction is "revers[ed] based on the weight, rather than the sufficiency, of the evidence." *Id.* at 32. The Court had no occasion to decide whether the Double Jeopardy Clause compels an appellate

c. Cross-petitioners contend (Pet. 6-15) that the court of appeals erred in reasoning that the Double Jeopardy Clause does not preclude retrial when, as in this case, an instructional error results from an intervening change in the controlling law, and the error deprived the government of the opportunity or incentive to present sufficient evidence under the correct instructions, but the evidence was sufficient under the instructions as given. See Pet. App. 31a (citing *United States* v. *Sanchez-Corcino*, 85 F.3d 549, 554 n.4 (11th Cir. 1996), overruled on other grounds by *Bryan* v. *United States*, 524 U.S. 184 (1998)). That contention lacks merit. As the court of appeals indicated in *Sanchez-Corcino*, 85 F.3d at 554 n.4, its conclusion follows from this Court's decision in *Lockhart*.

In *Lockhart*, this Court held that the Double Jeopardy Clause did not forbid retrial of a defendant under a habitual offender statute where his sentence had been set aside because one of the convictions supporting it had been pardoned. The Court concluded that when a conviction is reversed because the trial court has erroneously admitted certain evidence, the fact that the remaining evidence is insufficient to sustain a conviction does not bar a new trial, provided the evidence is sufficient when the erroneously admitted evidence is considered. *Lockhart*, 488 U.S. at 40-42.

The Court reasoned that "[t]he basis for the *Burks* exception to the general rule" allowing retrial after reversal of a conviction "is that a reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close

---

court that has reversed for instructional error also to evaluate the sufficiency of the evidence, and the Court did not address that question.

of all the evidence." *Lockhart*, 488 U.S. at 41. "A trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court." *Id.* at 41-42. The Court further reasoned that permitting retrial in such a situation "is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to 'obtai[n] a fair readjudication of his guilt free from error.'" *Id.* at 42 (brackets in original) (quoting *Burks*, 437 U.S. at 15). It also serves "the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.* at 38 (citation omitted). As the Court noted, if the district court had made the correct evidentiary ruling at trial, the prosecutor would have had an opportunity to offer additional available evidence. Thus, allowing retrial "merely recreates the situation" that would have existed if the trial court had ruled correctly. *Id.* at 42.

The same analysis applies to the situation where, as in this case, a defendant's conviction is reversed because instructions valid under the law prevailing at the time of trial are determined to be erroneous in light of a newly announced legal standard. An accurate analogy to the trial court's ruling on a motion for a judgment of acquittal requires the appellate court to assess the sufficiency of the evidence under the instructions actually given, not the instructions that are correct under the intervening change in law. Allowing the government to retry the

defendant under the correct legal standard does not countenance the kind of oppression that the Double Jeopardy Clause seeks to prevent. The government structured its case at trial in reliance on prevailing circuit law, and it therefore had no incentive to present evidence that would satisfy the newly announced legal standard. Thus, the evidence actually introduced by the government did "not necessarily reflect all other available evidence." *United States* v. *Harmon*, 632 F.2d 812, 814 (9th Cir. 1980). Indeed, "[i]t is impossible to know what additional evidence the government might have produced had the" correct legal standard been applied at trial. *Ibid.*

If the Double Jeopardy Clause barred retrial in those circumstances, the government would be at risk in relying on prevailing law and on the trial court's rulings. The government would be forced to proffer evidence in support of multiple legal standards to guard against the risk of a change in prevailing circuit law. But evidence related to alternate theories of prosecution likely would be found irrelevant and, hence, disallowed.[3] Prosecutorial resources would be wasted, the trial would be prolonged unnecessarily, and, to the extent evidence of alternative theories was admitted, jurors might be con-

---

[3] Indeed, in this case, the district court repeatedly stated that, in light of the then-controlling legal standard, the government need not show that either Avondale Creek or Village Creek is a traditional navigable water, and the court discouraged the development of evidence on the navigability of Village Creek and other tributaries connecting Avondale Creek with the Black Warrior River (which the parties agreed is a traditional navigable water). See, *e.g.*, Tr. 2239-2244 (interrupting testimony that Locust Fork River is a Section 10 water).

fused by extraneous evidence. The Double Jeopardy Clause does not require those undesirable results.[4]

Those courts that have squarely addressed the issue have correctly concluded that retrial in these circumstances does not offend the Double Jeopardy Clause. See *United States* v. *Ellyson*, 326 F.3d 522, 532-535 (4th Cir. 2003); *Sanchez-Corcino*, 85 F.3d at 554 n.4; *United States* v. *Wacker*, 72 F.3d 1453, 1464-1465 (10th Cir. 1996); *United States* v. *Weems*, 49 F.3d 528, 530-531 (9th Cir. 1995). Thus, even assuming that Justice Kennedy's standard provides the controlling rule of law under *Rapanos*, and further assuming that the evidence presented at trial was insufficient to meet that standard, there is no double jeopardy bar to retrial.[5]

---

[4] Contrary to cross-petitioners' contention (Pet. 9), *Sanabria* v. *United States*, 437 U.S. 54 (1978), has no bearing on this issue. *Sanabria* stands merely for the proposition that "there is no exception [to the Double Jeopardy Clause] permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous.'" *Id.* at 75 (quoting *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962)). Because cross-petitioners were not acquitted, *Sanabria* is inapposite.

[5] Cross-petitioners contend (Pet. 10-14) that the reasoning of *Lockhart* should not apply here because, according to them, the government deliberately chose to try this case on a legal theory that it knew to be erroneous. They assert that "[t]he government was on full and fair notice" (Pet. 13) that the instructions given by the trial court were contrary to *SWANCC* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001), which (in their view) adopted the "significant nexus" standard that Justice Kennedy later endorsed in his *Rapanos* concurrence. As an initial matter, the premises of cross-petitioners' argument—that Justice Kennedy's concurrence establishes the controlling rule of law under *Rapanos* and that Justice Kennedy's standard was established by *SWANCC*—are incorrect. Moreover, contrary to cross-petitioners' assertions, the jury instructions reflected the prevailing law in the Eleventh Circuit. The standard in the instructions was set forth in *United States* v. *Eidson*, 108 F.3d 1336, 1342 (11th Cir.), cert. denied, 522

2. Cross-petitioners contend (Pet. 15-18) that the conclusion by the court below that retrial would not violate the Double Jeopardy Clause conflicts with decisions of the Fifth, Seventh, and Tenth Circuits. Contrary to that contention, none of those circuits has held that the Double Jeopardy Clause bars a retrial where, as here, the court both reversed the defendant's conviction for instructional error based on an intervening change of law and made no finding that the evidence was insufficient to support the conviction.

a. The Fifth Circuit has squarely held that the Double Jeopardy Clause does not preclude a retrial in these circumstances. In *Miller*, that court reversed the defendants' convictions for mail fraud because of indictment and instructional error based on this Court's intervening decision in *McNally* v. *United States*, 483 U.S. 350 (1987). See *Miller*, 952 F.2d at 869. The government obtained a new indictment, and the defendants sought its dismissal on double jeopardy grounds, arguing that the government had presented insufficient evidence at their first trial to support a conviction under the *McNally* standard. *Id.* at 869-870. The court of appeals rejected that argument. Relying on *Richardson* and *Lydon*, the court held that the Double Jeopardy Clause did not bar the defendants' retrial because the court had reversed their convictions for instructional error without making any finding on the sufficiency of the evidence, and the Double Jeopardy Clause did not require the court to make a sufficiency finding. *Id.* at

---

U.S. 899, and 522 U.S. 1004 (1997). In *Parker* v. *Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (2004), the Eleventh Circuit held that the *Eidson* standard was not altered by this Court's decision in *SWANCC*. Indeed, the district court made clear that it was following Eleventh Circuit precedent in *Eidson* and *Parker*. See 3/2/05 Order.

870-874. *Miller* establishes that the Fifth Circuit, like the court below, would conclude that double jeopardy does not bar cross-petitioners' retrial.

Cross-petitioners contend (Pet. 17) that the decision below conflicts with the Fifth Circuit's decisions in *United States* v. *McPhail*, 112 F.3d 197 (1997), and *United States* v. *Oreira*, 29 F.3d 185 (1994). That is not correct. In both those cases, the Fifth Circuit actually made a finding on the sufficiency of the evidence, see *McPhail*, 112 F.3d at 199-200; *Oreira*, 29 F.3d at 188 n.5, whereas the court below expressly declined to make a finding whether the evidence was sufficient under *Rapanos*, see Pet. App. 31a. Moreover, in neither *McPhail* nor *Oreira* did the Fifth Circuit discuss, much less call into question, its holding in *Miller* that the Double Jeopardy Clause does not require a court of appeals to make a finding on sufficiency once it has reversed for instructional error. Accordingly, the Fifth Circuit's statements about whether double jeopardy precluded retrial in *McPhail* and *Oreira* do not conflict with the Eleventh Circuit's conclusion that double jeopardy does not preclude retrial in this case.

b. Like the Fifth Circuit, the Seventh Circuit has squarely held that the Double Jeopardy Clause does not require a court of appeals to make a finding on the sufficiency of the evidence when the court reverses a defendant's conviction for instructional error. See *Douglas*, 874 F.2d at 1149-1150; *United States* v. *Anderson*, 896 F.2d 1076, 1077-1078 (7th Cir. 1990). And the Seventh Circuit, like the Fifth Circuit, has further held that, absent a finding that the evidence was insufficient, retrial does not violate the Double Jeopardy Clause. See *ibid.* *Douglas* and *Anderson* establish that the Seventh Cir-

cuit also would agree with the court below that double jeopardy does not bar cross-petitioners' retrial.

Contrary to cross-petitioners' contention (Pet. 17), the decision below does not conflict with the Seventh Circuit's decisions in *United States* v. *Jackson*, 103 F.3d 561 (1996), *United States* v. *Robinson*, 96 F.3d 246 (1996), and *United States* v. *Hightower*, 96 F.3d 211 (1996). In all three of those cases, the Seventh Circuit (unlike the court below) made findings on the sufficiency of the evidence. See *Jackson*, 103 F.3d at 569; *Robinson*, 96 F.3d at 250-251; *Hightower*, 96 F.3d at 215. At the same time, the Seventh Circuit did not address, much less question, its holdings in *Douglas* and *Anderson* that the Double Jeopardy Clause does not compel a reviewing court to address evidentiary sufficiency when it reverses for instructional error. Indeed, the Seventh Circuit did not engage in double jeopardy analysis of any kind in any of the cases. Accordingly, those cases do not conflict with the determination of the court below that the Double Jeopardy Clause does not bar cross-petitioners' retrial.

c. Cross-petitioners' claim (Pet. 16 & n.4) that the decision below conflicts with Tenth Circuit cases is also incorrect. The Tenth Circuit, like the court below, has held that the Double Jeopardy Clause does not preclude retrial when an instructional error, caused by an intervening change in the law, has deprived the government of the opportunity or incentive to present sufficient evidence under the correct instructions, and the trial evidence was sufficient under the instructions as given. See *Wacker*, 72 F.3d at 1464-1465.

In *Wacker*, the Tenth Circuit reversed the defendant's conviction for "us[ing]" a firearm during and in relation to a drug trafficking crime, in violation of

18 U.S.C. 924(c), because of instructional error in light of this Court's intervening decision in *Bailey* v. *United States*, 516 U.S. 137 (1995). The court of appeals did not reverse the conviction outright. Instead, it remanded for a retrial, "at which time further evidence on the issue of 'use' [could] be presented." *Wacker*, 72 F.3d at 1465. Noting that the evidence at the initial trial "was sufficient to support a conviction for 'use' of a firearm under [the court's] then-existing standard," *id.* at 1464, the court concluded that the remand would not violate the Double Jeopardy Clause, *id.* at 1465. The court reasoned that allowing retrial would not unfairly give the government a second bite at the apple, because the government "cannot be held responsible for 'failing to muster' evidence sufficient to satisfy a standard which did not exist at the time of trial." *Ibid.* (citation omitted). Accordingly, the court concluded that the situation was analogous to *Lockhart* and that the Double Jeopardy Clause does not bar retrial when "a conviction is reversed solely for failure to produce evidence that was not theretofore generally understood to be essential to prove the crime." *Ibid.* (citation omitted). *Wacker* establishes that the Tenth Circuit, like the court below, would conclude that the Double Jeopardy Clause does not bar cross-petitioners' retrial.

Citing *United States* v. *Miller*, 84 F.3d 1244 (10th Cir.), cert. denied, 519 U.S. 985 (1996), and *United States* v. *Smith*, 82 F.3d 1564 (10th Cir. 1996), cross-petitioners argue (Pet. 16 & n.4) that the Tenth Circuit no longer follows *Wacker*. The Tenth Circuit has not so stated, however. Rather, in both *Miller* and *Smith*, the panels mistakenly assumed that *Wacker* held that remand for a new trial is permissible only when the evidence at the first trial was sufficient for the jury to have

returned a guilty verdict "if properly instructed." *Miller*, 84 F.3d at 1258; see *Smith*, 82 F.3d at 1568.[6] On the contrary, as described above, *Wacker* held that remand for a new trial is permitted if the evidence at the first trial was sufficient under the instructions actually given. See 72 F.3d at 1464-1465.

Wacker remains the controlling law in the Tenth Circuit even though it has been misconstrued in some later panel decisions. See *United States* v. *Romero*, 491 F.3d 1173, 1177 (if panel decisions conflict, the earliest decision is binding), cert. denied, 128 S. Ct. 319 (2007). Indeed, in *United States* v. *Pearl*, 324 F.3d 1210, cert. denied, 539 U.S. 934 (2003), the Tenth Circuit's most recent discussion of the subject, the court again applied its analysis in *Wacker* in addressing a change in the law based on an intervening Supreme Court decision. In *Pearl*, the defendant was convicted on child pornography charges. The Tenth Circuit held that the jury instructions were erroneous, under the intervening decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), and reversed and remanded for a new trial, rejecting the defendant's argument that retrial was barred by the Double Jeopardy Clause. The court of appeals explained that the "government 'cannot be held responsible for "failing to muster" evidence sufficient to satisfy a standard * * * which did not exist at the time of trial,' and because this is 'trial error' rather than 'pure insufficiency of evidence,' [the defendant] may be retried without violating double jeopardy." *Pearl*, 324 F.3d at 1214 (quoting *Wacker*, 72 F.3d at 1465). Although the court also commented that the evidence was

---

[6] The panel in *United States* v. *Simpson*, 94 F.3d 1373 (10th Cir.), cert. denied, 519 U.S. 975 (1996), which cross-petitioners do not cite, appears to have similarly misread *Wacker*. See *id.* at 1379.

sufficient under the new *Ashcroft* standard, *ibid.*, its basic conclusion, consistent with *Wacker*, was that "[t]he government may retry a defendant whose convictions, as here, are set aside due to trial error without running afoul of the Double Jeopardy Clause," except when "the government produces *no* evidence at trial," *ibid.*, *i.e.*, the evidence was not sufficient under *any* standard. Moreover, any intra-circuit conflict is a matter for the Tenth Circuit, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

d. As cross-petitioners note (Pet. 15-16 n.3), several circuits have adopted a policy that they will review insufficiency claims even when they reverse convictions for instructional or other trial errors. But, as the Fifth Circuit noted in *Miller*, that is not a constitutional requirement: "[i]n general, * * * these cases hold only that an appellate court should, or in the exercise of its discretion normally will, review the sufficiency of the evidence as well even if it has already determined that a conviction must be reversed on other grounds." 952 F.2d at 872. See, *e.g.*, *id.* at 874 (stating that review of sufficiency claims is "the better practice"); *United States* v. *Wallach*, 979 F.2d 912, 918 (2d Cir. 1992) (stating that "we prefer not to subject the defendant to retrial" without considering his sufficiency claim), cert. denied, 508 U.S. 939 (1993); *Bishop*, 959 F.2d at 829 n.11 (explaining that, under *Richardson*, "appellate courts are not *required* to consider sufficiency issues," but "we find nothing in *Richardson* which *prevents* appellate courts from assessing the sufficiency of the evidence if they so wish"); *Douglas*, 874 F.2d at 1150 (adopting "a policy in this circuit of routinely addressing evidentiary sufficiency in criminal cases when a defen-

dant presents the issue on appeal"). The decision of those circuits that, as a policy matter, they will generally review sufficiency claims even when reversing for instructional error, does not conflict with the decision of the court below that the Double Jeopardy Clause did not compel it to determine whether the trial evidence was insufficient under the new standard it drew from *Rapanos*.

Indeed, the Eleventh Circuit has also adopted a prudential policy that it will generally review sufficiency claims even when reversing for trial error. See, *e.g.*, *United States* v. *Bobo*, 419 F.3d 1264, 1268 (2005). Cross-petitioners have not sought this Court's review on the ground that the Eleventh Circuit failed to follow that policy in this case. Nor would that fact-bound claim warrant this Court's review.[7]

3. In all events, this case is not an appropriate vehicle to resolve any tension that may exist among the courts of appeals on how to apply the Double Jeopardy Clause in this context. Cross-petitioners would not have a valid double jeopardy claim regardless of how this Court interpreted the Clause, because the trial evidence was sufficient to support their convictions under any

---

[7] The Tenth Circuit too has adopted a policy that it generally will review sufficiency claims even if it reverses a defendant's conviction for trial error. See *United States* v. *Haddock*, 961 F.2d 933, 934, cert. denied, 506 U.S. 828 (1992). Unlike other courts of appeals, the Tenth Circuit has suggested (albeit without any analysis) that its practice is "require[d]" by the Double Jeopardy Clause. *United States* v. *Wiles*, 106 F.3d 1516, 1518, cert. denied, 522 U.S. 947 (1997). But even if the Tenth Circuit were to address a sufficiency claim like cross-petitioners' claim based on an intervening change of the law, under *Wacker*, it would conclude that double jeopardy does not bar retrial where, as here, the evidence was sufficient under the law prevailing at the time of trial. See pp. 18-21, *supra*.

possible interpretation of *Rapanos*. The evidence was sufficient for a reasonable jury to conclude that Avondale Creek, the stream into which cross-petitioners dumped their polluted wastewater, was a "water[] of the United States," 33 U.S.C. 1362(7), under *either* the *Rapanos* plurality's standard *or* Justice Kennedy's "significant nexus" standard.

The *Rapanos* plurality interpreted the term "waters of the United States" to include "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739, that are connected to traditional navigable waters, *id.* at 742. As described in the government's petition for a writ of certiorari (at 8-10), clear and unambiguous testimony at trial indicated that Avondale Creek flows continuously to traditional navigable waters—contributing water year-round to Village Creek, Bayview Lake, Locust Fork, and, in turn, the Black Warrior River, which cross-petitioners below conceded is a traditional navigable water, 08-223 Pet. Reply 8.

The evidence was also sufficient to support a jury finding that Avondale Creek has a "significant nexus" to traditional navigable waters under Justice Kennedy's standard. Under that standard, "significance" is determined with reference to the CWA's purpose—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a). *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). Justice Kennedy also noted that the presence of an "ordinary high-water mark" for ephemeral streams "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act." *Id.* at 781. The evidence at trial established that Avondale Creek is a perennial stream with an estab-

lished bed and bank and that it overflows its over-six-feet high banks after rainstorms. See 08-223 Pet. 8-10 & n.5; Tr. 4552-4554 (testimony that Avondale and Village Creeks carry a "tremendous amount of sediment," "come up fast" after "significant rainfall events," and "can be very dangerous"); Tr. 2027-2028 (Avondale Creek overflows its banks and floods the McWane plant). The evidence further showed that Avondale Creek is capable of transporting pollutants downstream to traditional navigable waters. Tr. 147-148, 170-171, 189, 232 (observation of significant quantities of pollution from McWane pipes flowing into Village Creek); Tr. 1816-1818, 1860-1861, 2130-2132 (observation of McWane's pollutants miles downstream in Village Creek). A rational jury could infer that Avondale Creek has a significant nexus to the downstream traditional navigable waters into which it flows and that its water quality is "likely to play an important role in the integrity of [that] aquatic system." *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring).

Because the evidence was sufficient to support cross-petitioners' convictions under any possible interpretation of *Rapanos*, this case is not an appropriate vehicle to review cross-petitioners' claim that retrial would violate the Double Jeopardy Clause under what the court below held was the correct *Rapanos* standard.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
RONALD J. TENPAS
Assistant Attorney General
KATHERINE W. HAZARD
DEBORAH WATSON
Attorneys

OCTOBER 2008

Supreme Court, U.S.
FILED
NOV 10 2008
OFFICE OF THE CLERK

No. 08-364

IN THE
Supreme Court of the United States

MCWANE, INC., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE CROSS-PETITIONERS

LAWRENCE S. LUSTBERG
KEVIN MCNULTY
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
JASON J. MENDRO
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Cross-Petitioners
[Additional Counsel Listed on Inside Cover]

G. DOUGLAS JONES
HASKELL SLAUGHTER YOUNG
& REDIKER LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, AL 35203
(205) 251-1000

HENRY J. DEPIPPO
NIXON PEABODY LLP
1100 Clinton Square
P.O. Box 31051
Rochester, NY 14604
(585) 263-1243

FOURNIER J. GALE, III
J. ALAN TRUITT
CHRISTOPHER J. WILLIAMS
MAYNARD COOPER & GALE PC
2400 Regions Harbert Plaza
1901 6th Avenue North
Birmingham, AL 35203
(205) 254-1000

JACK W. SELDEN
DAVID E. ROTH
SCOTT BURNETT SMITH
BRADLEY ARANT ROSE & WHITE
LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8000

JUDSON W. STARR
JOSEPH G. BLOCK
BRIAN L. FLACK
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
(202) 344-4000

RULE 29.6 STATEMENT

The corporate disclosure statement included in the conditional cross-petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR THE CROSS-PETITIONERS 1

I. THIS COURT'S PRECEDENTS PRECLUDE THE GOVERNMENT'S ARGUMENTS 3

II. THE DIVISION OF AUTHORITY AMONG THE CIRCUITS IS DEEP 7

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Bailey v. United States,
516 U.S. 137 (1995) 9

Burks v. United States,
437 U.S. 1 (1978) 3, 4

Jackson v. Virginia,
443 U.S. 307 (1979) 3, 4

Justices of Boston Mun. Ct. v. Lydon,
466 U.S. 294 (1984) 5, 6

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995) 12

Ortega-Rodriguez v. United States,
507 U.S. 234 (1993) 9

Rapanos v. United States,
547 U.S. 715 (2006) 2

Richardson v. United States,
468 U.S. 317 (1984) 5, 6

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 2, 11

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs,
531 U.S. 159 (2001) 2

Tibbs v. Florida,
457 U.S. 31 (1982) 4, 5, 8

United States v. Needham (In re Needham),
354 F.3d 340 (5th Cir. 2003) 3

United States v. Pearl,
324 F.3d 1210 (10th Cir. 2003) 10

United States v. Perez,
9 Wheat 579 (1824) 5

United States v. Simpson,
94 F.3d 1373 (10th Cir. 1996) 10

United States v. Smith,
82 F.3d 1564 (10th Cir. 1996) 10

United States v. Wacker,
72 F.3d 1453 (10th Cir. 1995) 9

United States v. Wood,
958 F.2d 963 (10th Cir. 1992) 6

United Steelworkers of Am., AFL-CIO-CLC v. Weber,
443 U.S. 193 (1979) 1

STATUTES

18 U.S.C. § 924(c) 8

REPLY BRIEF FOR THE CROSS-PETITIONERS

The court of appeals unambiguously concluded that the government "did not present *any* evidence" —much less legally sufficient evidence—under the *correct* analysis of the jurisdictional element of the Clean Water Act. 08-223 Pet. App. 27a–28a (emphasis added). Despite this clear finding, the court refused to order judgments of acquittal because it believed that a retrial would comport with the Double Jeopardy Clause if the evidence was sufficient under the *erroneous* interpretation of the Act that the government aggressively pressed upon the trial court over the defendants' repeated and vociferous objections. The court of appeals was wrong to believe that permitting a retrial in these circumstances is remotely consistent with basic double jeopardy protections, this Court's cases, or rudimentary principles of fairness. The Eleventh Circuit's error, on a legal issue that has divided the circuits, warrants this Court's review.

The government's opposition purports to address a number of questions, but nowhere does it directly confront the question that the cross-petition presents: whether the Double Jeopardy Clause bars retrial when the government failed to produce sufficient evidence under the *correct* definition of the elements of the offense. To elide that question, the government attempts a veritable "*tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini." *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 222 (1979) (Rehnquist, J., dissenting).

The government, however, is no Houdini. All of its sleights-of-hand are transparent and unsuccessful.

First, the government repeatedly suggests that the law somehow, surprisingly "changed" between the trial and the appeal of this case. But the government cannot benefit here from the fact that, before *Rapanos v. United States*, 547 U.S. 715 (2006), it had persuaded a handful of *lower* courts to ignore this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001). Those lower court rulings were never the law. This Court's "construction of a statute is an authoritative statement of what the statute meant *before* as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994) (emphasis added); *see* Pet. 8 & 15. Tellingly, the government does not once address *Rivers*.[1]

Second, the government asserts that there is no substantive constitutional right that requires an appellate court to rule on sufficiency claims. On this view, *Burks v. United States*, 437 U.S. 1 (1978), is purely a procedural rule akin to *res judicata*: a second trial is barred only if a court has affirmatively elected to assess sufficiency and has declared the

---

[1] Indeed, the government's notion that it is, even now, entitled to benefit from the errors it intentionally foisted on some lower courts rings particularly hollow in this case, which was tried *after* the Fifth Circuit had rejected the government's attempt to ignore *SWANNC*, *see United States v. Needham (In re Needham)*, 354 F.3d 340, 345 (5th Cir. 2003), and thus the conflict that this Court addressed in *Rapanos* already existed.

evidence insufficient. It is unclear why the government believes this supposed "rule" helps its case, since the Eleventh Circuit did declare in this case that the government presented *no evidence* under the correct legal standard. 08-223 Pet. App. 27a–28a. But in any event, the government's cramped understanding of constitutional protections is surely wrong. A claim of insufficiency of the evidence is a substantive legal claim that *must* be addressed and correctly resolved when properly presented, not only on direct appeal but even in federal habeas corpus. *See Jackson v. Virginia*, 443 U.S. 307, 318 (1979). And if the government presented "no evidence" on an element of the crime, as the Eleventh Circuit found here, *Burks* squarely forbids a second trial for the same offense.

Finally, the government contends that there is no circuit "conflict" even though it readily concedes that in some circuits an appellant who presents a meritorious challenge to the sufficiency of the government's proofs will avoid retrial on double jeopardy grounds, while in other circuits he will be sent back to the district court to face the very real risk of conviction at a second trial, where the government may supply evidence that it failed to muster at the first trial. This genuine conflict warrants the Court's review.

I. THIS COURT'S PRECEDENTS PRECLUDE THE GOVERNMENT'S ARGUMENTS

The government concedes that the Constitution bars retrial after an appellate court reverses a conviction based on insufficiency of the evidence. Opp. 7; *Burks*, 437 U.S. at 18. Yet the government maintains that after reversing an invalid conviction

an appellate court may *always* remand for retrial by simply ignoring insufficiency claims. No court can have "discretion," however, to ignore a properly presented claim that the prosecution presented constitutionally insufficient evidence to support a conviction—a claim that is cognizable even on habeas review of state convictions. *See Jackson*, 443 U.S. at 320–21.

The government's interpretation of *Burks* is also illogical on its own terms, would render the double jeopardy protections recognized in *Burks* a virtual nullity, and is inconsistent with *Tibbs v. Florida*, 457 U.S. 31 (1982). Tibbs argued that this Court's decision not to extend double jeopardy protections to reversals based on the *weight* of the evidence would "undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence." *Id.* at 44. If the government's view were correct, this Court would have replied that there is no right *at all* to have the sufficiency argument addressed on appeal. It certainly would have had no reason to discuss federal constitutional "restraints on the power of appellate courts to mask reversals based on legally insufficient evidence as reversals grounded on the weight of the evidence." *Id.* at 45 (citing *Jackson*).

The two cases on which the government principally relies—*Richardson v. United States*, 468 U.S. 317 (1984), and *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984)—actually demonstrate how far the government needs to stretch in its effort to avoid *Burks*. The defendant in *Richardson* was seeking an *extension* of *Burks*. Although this Court has held since the earliest days of the Republic that a defendant may be tried a second time if his first

trial *never even concluded*—because a mistrial was declared (*see United States v. Perez*, 9 Wheat. 579 (1824))—Richardson contended that no retrial could occur in such a case unless the evidence that had been adduced before the mistrial was sufficient to support a conviction. This Court was "entirely unwilling to uproot [its] settled line of authority [governing mistrials] by extending the reasoning of *Burks*," even if such an extension might be logical, because it found that the mistrial context uniquely called for applying "Justice Holmes' aphorism that 'a page of history is worth a volume of logic.'" *Richardson*, 468 U.S. at 325–26.[2]

Lydon is even farther afield. It involved an unusual Massachusetts procedure allowing *defendants* charged with minor crimes to *opt* for two trials—first a bench trial and, if convicted, a *de novo* trial by jury. 466 U.S. at 296–97. The Court had no occasion to address the duty of appellate courts to decide a properly presented claim of insufficiency of evidence, much less the effect of a reversal on appeal, because there was no right to appeal following a bench trial under this unique state procedure. Since the government, unsurprisingly, can point to no centuries-old practice treating controlling opinions like *Burks*

---

[2] This Court has not expanded the application of the continuing jeopardy principle since *Richardson*, especially not to a case where a judgment of conviction was entered and then reversed on appeal. And lower courts have therefore interpreted *Richardson* narrowly. *See, e.g.*, *United States v. Wood*, 958 F.2d 963, 970 (10th Cir. 1992) ("*Richardson*'s failure to elaborate on what events terminate jeopardy or when the continuing jeopardy principle is applicable makes us reluctant to mechanically apply its holding to a different set of facts.").

as optional admonitions, or to any indication that the federal appellate process contains some outlandish quirk that this Court could not have anticipated in *Burks* itself, its reliance on *Richardson* and *Lydon* in defense of the judgment below is, at best, fanciful.

The government argues nonetheless that federal appellate courts are free to avoid review of sufficiency of evidence claims for any reason, or for no reason at all. It identifies no other criminal appellate issue that a court may decline to reach even though a favorable ruling would change the outcome of the appeal. If sufficiency of evidence is merely an optional claim, presumably a court could decline to address it even if it is the only claim on appeal.[3] This Court's precedents admit of no such rule.

In any event, the court below *did* reach and decide the sufficiency of evidence issue. The Eleventh Circuit even went so far as to state that the government failed to adduce evidence sufficient to prove that cross-petitioners violated the CWA as that Act is correctly construed:

> Wagoner (the EPA investigator [and the government's expert witness]) . . . did not testify as to any "significant nexus" between Avondale Creek and the Black Warrior River. The government *did not present any evidence*, through Wagoner or

---

[3] Perhaps the government believes that sufficiency claims must be considered only if they are tendered as the *sole* claim on appeal. That would be utterly nonsensical: the more error the government commits at trial—even error having no possible bearing on its failure to present sufficient proofs—the greater the likelihood that the government would win a second bite at the apple.

> otherwise, about the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River, and there was also *no evidence presented* of any actual harm suffered by the Black Warrior River.

08-223 Pet. App. 27a–28a (emphases added). This direct ruling squarely presents the double jeopardy question, even on the government's view.

II. THE DIVISION OF AUTHORITY AMONG THE CIRCUITS IS DEEP

Despite its best efforts to the contrary, the government succeeds only in highlighting the disarray plaguing the circuit courts on how the double jeopardy protections recognized in *Burks* must be applied. The government openly concedes that the circuits enforce those protections inconsistently: "several circuits have adopted a policy that they will review insufficiency claims even when they reverse convictions for instructional or other trial errors." Opp. 21. This inconsistent application of protection against the government "honing its trial strategies and perfecting its evidence through successive attempts at conviction," *Tibbs*, 457 U.S. at 41, lies at the heart of the question presented. In fact, the government concedes a *three-way* circuit split: the circuits that review sufficiency claims despite other grounds for reversal are divided over whether such review is constitutionally required or merely prudential. *Compare* Opp. 21–22 *with id.* at 22 n.7.[4]

---

[4] Even if there were some ground for supposing that the duty of courts of appeals to review, and correctly adjudicate, insuffi-

[Footnote continued on next page]

The government also argues that no circuit would bar a retrial here because "an intervening change of law" accounted for its failure of proof. Opp. 16. The government is wrong on both conclusion and premise.

As to the conclusion, even the government concedes that the Tenth Circuit holds that the Constitution *requires* review of sufficiency claims, albeit (according to the government) "without any analysis." Opp. 22 n.7. Moreover, the Tenth Circuit also expressly rejects the government's view that sufficiency should be judged against an incorrect definition of the offense. The government dismisses a solid line of Tenth Circuit authority on the ground that each panel "misconstrued" the Tenth Circuit's earlier decision in *United States v. Wacker*, 72 F.3d 1453 (10th Cir. 1995). Opp. 20. But *Wacker*, which involved 18 U.S.C. § 924(c), in fact *barred* retrial on all counts where the proofs were insufficient under the standard set forth in *Bailey v. United States*, 516 U.S. 137 (1995)—even though, before this Court decided *Bailey*, the courts of appeals had accepted the government's expansive view of the statute. It permitted retrial *only* on count seven, where the court "[could] not say how a jury might decide this issue [of

---

[Footnote continued from previous page]
ciency claims is a matter of supervisory authority rather than constitutional right, this Court will review inconsistent assertions of supervisory authority by courts of appeals where, as here, a uniform national rule of procedure is needed to ensure that similarly situated parties are treated in the same manner. *See, e.g., Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993).

'use'] if properly instructed under the law as defined by *Bailey*." 72 F.3d at 1463–65.

Wacker "held that outright reversal is required only where there is no evidence that could support a defendant's conviction under the *proper* legal standard." *United States v. Simpson*, 94 F.3d 1373, 1379 (10th Cir. 1996) (emphasis added). The government's suggestion that the *Simpson* panel misunderstood the decision a year earlier in *Wacker*, even though *Simpson* directly cited *Wacker* on the very point at issue, would come as some surprise to Judge Ebel, who authored *both* opinions. Thus, the circuit conflict is real and not susceptible to intra-circuit repair.[5] The government's attempts to distinguish the other conflicting cases cited in the cross-petition, are similarly off the mark.

The government, for good measure, is also wrong on its premise: there was no "change" in the law. *See Rivers*, 511 U.S. at 312–13. The government engaged in a calculated strategy of disregarding its losses in this Court, and would suffer no injustice if cross-petitioners' constitutional rights were enforced.

---

[5] *United States v. Pearl*, 324 F.3d 1210 (10th Cir. 2003), also does not create an intra-circuit conflict. The government speculates that when *Pearl* observed, in dicta, that double jeopardy bars retrial where "the government produces *no* evidence at trial," Opp. 21 (quoting *Pearl*), it meant where "the evidence was not sufficient under *any* standard," *id.* at 21. But *Pearl*'s citation here was *United States v. Smith*, 82 F.3d 1564 (10th Cir. 1996), one of the cases that the government concedes *supports* the rule that "double jeopardy principles" bar retrial unless "the evidence would have been sufficient to support a conviction for carrying a firearm under a *proper* instruction." 82 F.3d at 1567 (emphasis added).

Indeed, far from being deprived of the opportunity or incentive to present sufficient evidence, the government fought quite hard for the right to be relieved of that need. It is disingenuous in the extreme for the government to complain that *the court* "discouraged" the development of evidence required to meet the government's burden. Opp. 14 n.3.

III. This Case Is An Ideal Vehicle For Resolving The Circuit Conflict

The government claims that cross-petitioners would not benefit from a double jeopardy ruling "because the trial evidence was sufficient to support their convictions under any possible interpretation of *Rapanos*." Opp. 22–23. By "any possible interpretation," the government means the two incorrect interpretations to which it clings as it seeks to avoid, once again, the limitations this Court has placed on federal authority under the CWA.

First, the government implausibly contends that the *Rapanos* plurality construes the CWA to regulate virtually all waters in the United States, no matter how remote or insignificant their link to traditionally navigable, interstate waters. This interpretation is wrong for all the reasons stated before. 08-223 Opp. 11–26. The evidence was insufficient because the government failed to show, among other things, proximity between Avondale Creek and interstate navigable waters or, for that matter, that discharges ever flowed to interstate navigable waters.[6] Thus, even

---

[6] Indeed, the government concedes that the Black Warrior River is not an "interstate" waterway. 08-223 Reply 9. It nonetheless contends that it is a water "of the United States" be-

[Footnote continued on next page]

under the plurality test the Double Jeopardy Clause bars retrial.

Second, the argument that this Court should deny review because the evidence satisfied Justice Kennedy's significant nexus test is startling; the Eleventh Circuit, which thoroughly canvassed the record to address the *very same* fact-intensive issue, concluded that the government utterly failed to present *any* such evidence. 08-223 Pet. App. 27a–28a. The government's related assertion about the toxicity of the discharges is once again completely undermined by the record. "The government presented no evidence, through [its EPA expert] or otherwise, of the chemical, physical or biological effect that Avondale Creek's waters had or might have had on the Black Warrior River. Indeed, the district court observed that there was no evidence of any actual harm or injury to the Black Warrior River." *Id.* at 4a.

[Footnote continued from previous page]
cause waters flowing *from* it eventually reach *other* waters that actually are interstate. *Id.* n.5 (noting that the Black Warrior River leads to the Tombigbee River, which leads to the Mobile River, which leads to the Gulf of Mexico). Here again, the government ascribes to the plurality a *Finding Nemo*, all-drains-lead-to-the-ocean approach that the plurality squarely rejected. Whether cross-petitioners conceded the Black Warrior River's *navigability* is irrelevant; the plurality *additionally* requires that even navigable waters be waters of the United States. And because defendants argued that the government failed the plurality test, any waiver assertions are frivolous. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (a party may make all arguments encompassed within its preserved federal claim, even arguments it expressly disavowed below).

In any event, the arguments the government makes now about *Rapanos* would be before the Court if it grants the government's petition. If cross-petitioners prevail on the merits of those arguments, the double jeopardy claim on which the circuits are split will be squarely presented.

CONCLUSION

The question presented in the cross-petition is based on an entrenched and pernicious circuit conflict, and it is far more worthy of review than the government's question. If the Court grants the government's petition, the cross-petition should be granted, and the Court should summarily affirm reversal of the convictions with a remand for dismissal of the indictment.

Respectfully submitted.

LAWRENCE S. LUSTBERG
KEVIN MCNULTY
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
JASON J. MENDRO
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

G. DOUGLAS JONES
HASKELL SLAUGHTER YOUNG & REDIKER LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, AL 35203
(205) 251-1000

HENRY J. DEPIPPO
NIXON PEABODY LLP
1100 Clinton Square
P.O. Box 31051
Rochester, NY 14604
(585) 263-1243

FOURNIER J. GALE, III
J. ALAN TRUITT
CHRISTOPHER J. WILLIAMS
MAYNARD COOPER & GALE PC
2400 Regions Harbert Plaza
1901 6th Avenue North
Birmingham, AL 35203
(205) 254-1000

JACK W. SELDEN
DAVID E. ROTH
SCOTT BURNETT SMITH
BRADLEY ARANT ROSE & WHITE LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8000

JUDSON W. STARR
JOSEPH G. BLOCK
BRIAN L. FLACK
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
(202) 344-4000

Counsel for Cross-Petitioners

NOVEMBER 10, 2008